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No. 86-127

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

RALPH SHERLOCK,
Petitioner,

vs.

MERCED UNION HIGH SCHOOL DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT MERCED UNION HIGH SCHOOL DISTRICT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the lower courts correctly rule that, as part of Mr. Sherlock's disparate treatment claim, he had to show some intent to discriminate against him because of his age?

Where the District Court found that age was not a determining factor in the School District's conduct, must it, nonetheless, find a *per se* ADEA violation if it disbelieves any part of the defendant's evidence?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS BELOW AND JURISDICTION 1

STATUTES INVOLVED 1

RESPONDENT'S STATEMENT OF THE CASE . . . 1

REASONS FOR DENYING THE WRIT 4

I. THE FACTS OF THIS CASE MAKE MR. SHERLOCK'S LEGAL ASSERTIONS MOOT 6

II. THE CIRCUITS ALL AGREE WITH THIS COURT THAT INTENT IS AN INTEGRAL ELEMENT OF PROOF IN THIS KIND OF DISPARATE TREATMENT ACTION 9

III. MR. SHERLOCK'S RIGID AND MECHANICAL INTERPRETATION OF THE *McDONNELL DOUGLAS* FORMULA HAS BEEN REJECTED BY THIS COURT, AND MISCONSTRUES THE FACTS OF THIS CASE 15

CONCLUSION 18

TABLE OF AUTHORITIES

PAGE

Bell v. Bolger, 535 F.Supp. 997 (D.C.Mo. 1982), *aff'd Bell v. Bolger*, 708 F.2d 1312 (8th Cir. 1983) 13-14

Blackwell v. Sun Electric Corp., 696 F.2d 1176 (6th Cir. 1983) 11, 12, 13

Fink v. Western Electric, 798 F.2d 909 (4th Cir. 1983) 13

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 16

Goodman v. Heublein, 645 F.2d 127 (2d Cir. 1980) 13

Horn v. Bibb County Commission, 713 F.2d 689 (11th Cir. 1983) 14

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 5, 10, 14

Johnson v. Lehman, 679 F.2d 918 (D.C. Cir. 1982) 14

Kelly v. American Standard, Inc., 640 F.2d 974 (9th Cir. 1981) 11

Kentroti v. Frontier Airlines, Inc., 585 F.2d 967 (10th Cir. 1978) 14

LaMontagne v. American Convenience Products, Inc., 750 F.2d 1405 (7th Cir. 1984) 12

PAGE

Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975) *cert. denied*, 422 U.S. 1045 (1975) 13

Massarsky v. General Motors, 706 F.2d 111 (3rd Cir. 1982) 13

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 15, 18

Parcinski v. Outlet Co., 673 F.2d 34 (2d Cir. 1982) 13

Sales v. Department of Justice, 549 F.Supp. 1176 (D.D.C.), *aff'd.* 717 F.2d 1480 (D.C. Cir. 1982) 14

Syvock v. Milwaukee Boiler Mfg. Co., Inc., 665 F.2d 149 (7th Cir. 1981) 11, 12, 13, 14

TWA v. Thurston, ___ U.S. ___, 105 S.Ct. 613, ___ L.Ed. 2d ___ (1985) 12

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 16

STATUTES

California Education Code § 44893 1, 7

California Education Code § 44951 1, 2

Respondent MERCED UNION HIGH SCHOOL DISTRICT respectfully submits its opposition to the pending Petition for a Writ of Certiorari in the above captioned action.

OPINIONS BELOW AND JURISDICTION

Respondent School District agrees with Petitioner's reference to the Opinions Below, and to his jurisdictional statement.

STATUTES INVOLVED

In addition to the statutes referred to in the Petition, this matter involves California Education Code §§ 44893 and 44951. The full texts of those statutory provisions are set forth in Appendix A, attached hereto.

RESPONDENT'S STATEMENT OF THE CASE

From 1962 to 1982, Petitioner RALPH SHERLOCK was Assistant Superintendent for

Instruction for Respondent MERCED UNION HIGH SCHOOL DISTRICT. In February, 1982, the District's Board of Trustees approved an administrative reorganization, in which Sherlock's position, and that of Director of Personnel, were merged into the one position of Director of Personnel and Instruction.

California law does not provide tenure for administrative positions; rather, Mr. Sherlock maintained his tenure as a teacher throughout his twenty year administrative career. Consistent with the mandate of California law, on March 15, 1982, Mr. Sherlock received the "Notice of Reassignment" required by Education Code § 44951, advising him of his right to take a teaching position. Mr. Sherlock was also urged to apply for an open principalship, and to apply for the new consolidated administrative position.

The administrative position was filled by 52-year old Gil Grover, who obtained the highest rating score from an interview committee composed of three administration representatives, and five independent representatives. Joseph Reeves, age 57, placed second in that process, and was appointed principal of Merced Union High School.

Before applying for any teaching or administrative position, Sherlock calculated the sum of his retirement pension, and proposed a "consulting agreement" which would make up the difference between his pension and his pay as a teacher. After determining "that retirement plus a consultant's contract would be more beneficial economically" (Petition Appendix, p. 11), Sherlock decided neither to apply for any principalship or administrative office, nor to accept a teaching position to

which he had a tenured right. Rather, he opted for early retirement, and a consulting position.

After doing so, Sherlock filed this action, alleging that he was constructively discharged because of his age. After a bench trial, the court determined that Sherlock was not constructively discharged at all, and that he was not the victim of any disparate treatment because of his age.

Sherlock appealed to the Ninth Circuit Court of Appeals, which rejected each of his arguments -- -- including several that it deemed "frivolous." Sherlock seeks a review of that decision.

REASONS FOR DENYING THE WRIT

The Ninth Circuit plainly followed the express and oft-stated rules announced by this

Court for determining age discrimination actions. Any fair statement of the "Questions Presented" to this Court would make that clear.

The Ninth Circuit did not hold that "intent to discriminate must be proven to establish a violation of the ADEA," and that question need not be presented to the Court. Rather, the Ninth Circuit held that this kind of "disparate treatment" case required proof of an intent to discriminate on the basis of age. That clear statement of law has been uniformly approved by the circuits, following this Court's instruction in footnote 15 of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

Similarly, the trial court did not find "that the employer's proffered reason for discharge is not credible." Indeed, the trial

court found no discharge at all -- -- but, rather, Mr. Sherlock's voluntary retirement and his failure to apply for, or accept, the available positions. Moreover, as the Ninth Circuit expressly noted, the district court's finding that "the District's contention that the sole purpose for the administrative reorganization was economy is not credible" is *not* inconsistent with the district court's finding that there was no age discrimination practiced against Mr. Sherlock.

When viewed in their natural contexts, it is clear that neither of the two questions presented by petitioner warrant review by this Court.

I. THE FACTS OF THIS CASE MAKE MR. SHERLOCK'S LEGAL ASSERTIONS MOOT

One basic factual issue makes this case a wholly inappropriate vehicle for the legal

assertions presented by Mr. Sherlock: he was not discharged at all but, rather, "he determined that retirement plus a consultant's contract would be more beneficial economically [than working]" (Petition Appendix, p. 11, Finding of Fact 16). The Court of Appeals agreed that "substantial evidence supports the Court's conclusions" that Sherlock "had not been constructively discharged." (Petition Appendix, p. 38.)

Sherlock was tenured as a school teacher, not as an administrator (*Id.*). California Education Code § 44893 codifies California's public policy which prohibits administrative tenure, and expressly protects a School District's right to return an employee to the classroom.

Sherlock did not want to become a teacher again (Petition Appendix, p. 39). Nor did he

apply for the open principalships and administrative positions, even though he knew they were available, and he was invited to apply. Rather, he decided to retire because he calculated that it was to his financial interest to do so (Petition Appendix, pp. 10-11, Finding of Fact 16), and because of his erroneous subjective belief that the reorganization was "aimed at him" (Petition Appendix p. 21, Conclusion of Law G).[1]

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1 Mr. Sherlock concedes this point in his Petition, admitting that "[r]ather than be subjected to the ridicule of demotion to a classroom teaching position, petitioner took early retirement" (Petition, p. 3). To the contrary, California law views the transfer of an administrative employee to the classroom to be a power integral to the efficient operation of a school system -- -- and not "the ridicule of demotion." The district court was clearly correct in rejecting Sherlock's subjective view that the reassignment was designed to humiliate him; the express text of the Education Code supports the court's conclusion.

On the facts, Mr. Sherlock voluntarily left the school district for his own well-considered economic reasons, and for his own poorly conceived emotional reasons. There is no possible challenge to the finding that he was not constructively discharged. Given those facts, this case does not provide the vehicle for disposing of the legal questions presented by Mr. Sherlock -- -- even if he had expressed those issues fairly.

II. THE CIRCUITS ALL AGREE WITH THIS COURT THAT INTENT IS AN INTEGRAL ELEMENT OF PROOF IN THIS KIND OF DISPARATE TREATMENT ACTION

In this disparate treatment case, Mr. Sherlock alleged that his administrative position was eliminated because of his age. In that factual context, the ADEA does not afford Mr. Sherlock relief if his position had been eliminated for any reason *other than* his

age. Therefore, the district court properly held that the elimination of Mr. Sherlock's position was actionable "only if, but for the defendant's motive to discriminate against the plaintiff because of his age, the employment decision would not have been made." (Petition Appendix, p. 20).

The Ninth Circuit considered and approved that holding (Petition Appendix, pp. 32-33), and focused upon the distinction between a disparate impact theory (which requires no proof of intent to discriminate) and a disparate treatment theory (which does require such proof).

This Court clearly made that distinction in footnote 15 of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977). But it is that very distinction which Mr. Sherlock has consistently ignored

in his arguments at all levels of the federal courts.

Therefore, Sherlock's citations to *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983), and *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981), are inapposite. Those cases stand for the proposition that intent need not be proven in a *disparate impact* case; they do not disturb the uniform authority which requires such proof in a disparate treatment case.

Mr. Sherlock similarly overreaches in citing to *Syvock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149 (7th Cir. 1981), as providing "a careful analysis" of a contrary view. The *Syvock* court was discussing the availability of liquidated damages, and not the elements of proof in a disparate treatment action. Nor has *Syvock* ever been cited by

any court for the proposition that a disparate treatment case may be proven absent an intent to discriminate.[2] Indeed, three years after the *Syvock* decision, the Seventh Circuit in *LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984), made clear that motive is an element to prove disparate treatment.

Moreover, the *Syvock* analysis was rejected by the *Blackwell* court cited by Sherlock. Immediately following the paragraph quoted by Petitioner, the *Blackwell* court noted that "every showing of intentional discrimination does not entitle the plaintiff

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2 The *Syvock* court's concern that proving intent would lead to the automatic imposition of liquidated damages in a disparate treatment case is laid to rest by this Court's ruling in *TWA v. Thurston*, ___ U.S. ___, 105 S.Ct. 613, ____ L.Ed. 2d _____ (1985), in which the Court defined "willful" within the meaning of the ADEA.

to liquidated damages" (696 F.2d 1176 at 1184). Thus, *Blackwell* rejects the analytical underpinning of the *Syvock* dictum upon which Sherlock bases his argument.

In addition to those cited by the Petitioner, among the other circuits which agree that an intent to discriminate must be part of a disparate treatment claim are: Second Circuit: *Goodman v. Heublein*, 645 F.2d 127, 131 (2d Cir. 1980); *Parcinski v. Outlet Co.*, 673 F.2d 34, 36 (2d Cir. 1982); Third Circuit: *Massarsky v. General Motors*, 706 F.2d 111, 117 (3rd Cir. 1982); Fourth Circuit: *Fink v. Western Electric*, 798 F.2d 909, 915 (4th Cir. 1983); Sixth Circuit: *Laugesen v. Anaconda Co.*, 510 F.2d 307, 314 (6th Cir.) *cert. denied* 422 U.S. 1045 (1975); Eighth Circuit: *Bell v. Bolger*, 535 F.Supp. 997, 1001 (D.C.Mo. 1982), *aff'd Bell v.*

Bolger, 708 F.2d 1312, 1316 (8th Cir. 1983); D.C. Circuit: *Johnson v. Lehman*, 679 F.2d 918, 922 (D.C. Cir. 1982); *Sales v. Department of Justice*, 549 F.Supp. 1176 (D.D.C.), *aff'd*. 717 F.2d 1480 (D.C. Cir. 1982).[3] No decision of any circuit court has been cited for the contrary proposition, for to do so would directly contradict this Court's express pronouncement in footnote 15 of *International Brotherhood of Teamsters*, *supra*.

This Court's distinction between disparate impact and disparate treatment cases has governed this field for the past decade. The circuits are uniform in following that analysis. Neither the isolated dictum in *Syvock*,

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3 See also, *Kentroti v. Frontier Airlines*, 585 F.2d 967, 969 (10th Cir. 1978); *Horn v. Bibb County Commission*, 713 F.2d 689, 691 (11th Cir. 1983).

nor the facts of this case, justify any departure from that clear and well understood standard.

III. MR. SHERLOCK'S RIGID AND MECHANICAL INTERPRETATION OF THE *McDONNELL DOUGLAS* FORMULA HAS BEEN REJECTED BY THIS COURT, AND MISCONSTRUES THE FACTS OF THIS CASE

This Court's landmark decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), set forth the basic standard of proof in employment discrimination actions. Unfortunately, that decision was often followed *too* strictly, as if it provided the sole method of proof in any discrimination action; therefore, this Court repeatedly cautioned that the *McDonnell Douglas* test provided only one way of analyzing a case, that it must be tailored to the facts of each particular case, and that it was not to be applied formalistically, rigidly or mechanically.

(*Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, n. 6, (1981).) Despite those cautions, Mr. Sherlock seeks to invoke an imagined *per se* rule that an ADEA violation is established by the district court's statement that one of the School District's contentions was "not credible." Mr. Sherlock's argument presents a misstatement of law, and a wholesale mischaracterization of the facts.

In its entirety, the subject Finding of Fact 12 states:

> While it is not the Court's function to second guess the decisions of the Board of Trustees, when the overall budgets of the District are reviewed for the period in question, the District's contention that the sole purpose for the administrative reorganization was economy is not credible.
> (Petition Appendix, p. 7-8, emphasis added.)

First, the district court does not refer to Mr. Sherlock's "discharge," since it found that there was no discharge at all. (See discussion at pp. 6-9, *supra*.)

Secondly, the district court did not reject the District's explanation as "not credible"; rather, the court did not believe that economy was "the *sole* purpose for the administrative reorganization." The obvious flaw in Mr. Sherlock's argument was expressed by the Ninth Circuit (Petition Appendix, p. 35-36): the district court found that additional reasons -- -- other than Mr. Sherlock's age -- -- motivated the reorganization.[4]

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At page 17 of his petition, Sherlock asserts that the School District presented no evidence to support any explanation for its conduct other than "economy." To the contrary, the Court of Appeals expressly found such evidence (Petition Appendix, p. 36).
(continued)

There is nothing inconsistent between the district court's finding, and its conclusion that age was not a determining factor in Mr. Sherlock's discharge. Nor did this Court intend the *McDonnell Douglas* test to require that if a district court disbelieved any of the employer's contentions, a *per se* ADEA violation is found. Rather, Mr. Sherlock's argument reflects precisely the "rigid and mechanical" reading of *McDonnell Douglas* that this Court has consistently attempted to dispel.

CONCLUSION

Since Mr. Sherlock was not discharged, and chose neither to apply for the administrative jobs filled by two other men in their

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Moreover, even if Sherlock's argument had factual merit (and it does not), "insufficiency of the evidence" would provide no basis to grant certiorari.

fifties, nor to accept the teaching job to which he had tenure, the legal issues that he raises are moot. Once one reaches those issues, one finds that Mr. Sherlock has not presented them fairly. Upon a fair reading of those issues, it is clear that the Court of Appeals correctly followed the law set forth by this Court, consistent with the holdings of the remaining circuits.

For all of the reasons stated above, the Petition for a Writ of Certiorari should be denied.

DATED: August 15, 1986.

Respectfully submitted,

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APPENDIX A

CALIFORNIA EDUCATION

CODE §§ 44893 and 44951

§ 44893. Retention of permanent classification upon advancement of teacher

A permanent employee when advanced from a teaching position to an administrative or supervisory position, or assigned any special or other type of work, or given special classification or designation requiring certification qualifications, shall retain his permanent classification as a classroom teacher.

§ 44951. Continuation in position unless notified

Unless a certificated employee holding a position requiring an administrative or supervisory credential is sent written notice deposited in the United States registered mail with postage prepaid and addressed to his last known address by March 15 that he may be released from his position for the following school year or unless the signature of such an employee is obtained by March 15 on such written notice that he may be released from his position for the following year, he shall be continued in such position. The provisions of this section do not apply to a certificated employee who holds a written contract with an expiration date beyond the current school year, or to a certificated employee holding a position that is funded for less than a school year, or to a certificated employee assigned to an acting position whose continuing right to hold this position depends on his being selected from an eligible list established for the position, or to the termination of employment pursuant to Section 44955. A certificated employee serving under Section 35042 shall be notified by March 1 if the governing board determines on an individual basis that he may be released for the following school year.